IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 4, 2007 Session

UNDERWOOD REPAIR SERVICE, INC. v. BILLY R. DEAN, PEGGY L. DEAN AND DEAN, L.L.P.

Appeal from the Chancery Court for Davidson County
No. 05-485-I Claudia C. Bonnyman, Chancellor

No. M2006-01367-COA-R3-CV - Filed June 18, 2008

This dispute arose over a strip of land located on the northern side of Underwood Repair Service's property and the southern side of the Deans' property. Underwood Repair Service asserted that it owned the disputed strip of land in fee simple, or, in the alternative, through adverse possession. The Deans filed a motion to dismiss both claims, and the trial court granted the motion to dismiss the adverse possession claim, finding Underwood Repair Service failed to allege facts sufficient to support that claim. The motion to dismiss the claim to fee simple ownership was initially denied, but it was then granted without prejudice to allow this appeal. After a thorough review of the record and applicable law, we conclude that the facts alleged in the complaint were sufficient to survive a motion to dismiss. Thus, we reverse the judgment of the chancery court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

ROBERT W. WEDEMEYER, SP. J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., and ROBERT L. HOLLOWAY, SP. J., joined.

T. Holland McKinnie and Mark M. Mizell, Franklin, Tennessee, for the Appellant, Underwood Repair Service, Inc.

Jonathan C. Stewart, Nashville, Tennessee, for the Appellees, Billy R. Dean, Peggy L. Dean, and Dean, L.L.C.

OPINION

Background

Relevant to this case, the Antioch Commercial Planned Urban Development ("P.U.D."). divided certain commercial land in Antioch into lots. William Underwood purchased one of these lots (Lot No. 1) from Jesse Wright. Underwood's company, Underwood Repair Service, subsequently purchased the lot from Underwood (collectively "Underwood"). Billy Dean, Peggy Dean, and Dean, L.L.P. (collectively "the Deans") own an adjacent lot (Lot No. 2). This dispute arose over a strip of land that both parties claim to own that rests on their common border.

Underwood purchased Lot No. 1 from Jesse R. Wright and Laurene W. Wright on July 30, 1999. The land in issue was fenced in by the Wrights and is accessible to Underwood's store, and he has used the fenced-in strip of land as part of its business since he purchased the lot. Sometime thereafter, a dispute arose between Underwood and the Deans as to the rightful ownership of the fenced-in portion of land.

William Underwood filed a complaint on February 22, 2005, alleging that he owned the strip of land in fee simple, and, in the alternative, that he had obtained the right to the land via adverse possession under Tennessee Code Annotated section 28-2-101. The warranty deed from the Wrights to Underwood, attached to the complaint, described the land as follows:

> Land in Davidson County, Tennessee, being Lot No. 1 on the Plan of Antioch Commercial P.U.D. Section One of record in Plat Book 5190, page 734, Register's Office for said County, to which reference is made for a more complete description.

The "Plat Book" page referenced in the deed was not attached to the complaint.

The Deans filed a motion to dismiss arguing Underwood failed to properly allege color of title to the disputed strip of land. Thus, the motion alleged, the adverse possession claim should be dismissed. Subsequent to the Defendant's motion to dismiss, Underwood filed a motion to substitute his company for himself as plaintiff. In support of this motion, Underwood attached, among other things, the plat book page referenced in the deed. Underwood filed a motion in response to the motion to dismiss, but he did not move to amend his complaint to attach the plat book page. Finding the motion to dismiss well taken, the trial court dismissed the adverse possession claim finding as follows:

> The Complaint fails to allege and Plaintiff has failed to demonstrate that Plaintiff adversely possessed the disputed area of land for the requisite period of seven years or that Plaintiff possessed color of title to the disputed area of land such that the alleged adverse possession of others may be tacked on to Plaintiff's alleged period of adverse possession so as to reach the requisite period of seven years.

The fee simple claim was later dismissed without prejudice so as to allow this appeal by Underwood. Thus, the concise question before this Court is whether the complaint and attachments sufficiently

allege Underwood's "color of title" to allow Underwood to tack on the Wrights' period of ownership.

Discussion

This case is before us after a dismissal pursuant to Tennessee Rule of Civil Procedure 12.02(6). The trial court determined that the facts alleged in the complaint failed as a matter of law to satisfy the requirements of Tennessee Code Annotated section 28-2-101. "'Construction of a statute and its application to the facts of a case are issues of law.'" *King v. Pope*, 91 S.W.3d 314, 318 (Tenn. 2002) (quoting *Patterson v. Tennessee Dept. of Labor and Workforce Dev.*, 60 S.W.3d 60, 62 (Tenn. 2001)). In order to properly decide a motion to dismiss for failure to state a claim upon which relief may be granted, the trial court must consider and is limited by the allegations of the complaint. A motion to dismiss pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief can be granted is the equivalent of a demurrer under our former common law procedure and thus is a test of the sufficiency of the leading pleading. *See Cornpropst v. Sloan*, 528 S.W.2d 188, 190 (Tenn. 1975). The motion admits the truth of all relevant and material averments in the complaint but asserts that the statements do not constitute a cause of action. *See id.* at 190. In considering whether to dismiss a complaint for failure to state a claim, the court should construe the complaint liberally in favor of the plaintiff, taking all of the allegations of fact therein as true. *See Huckeby v. Spangler*, 521 S.W.2d 568, 571 (Tenn. 1975). A complaint should not be dismissed upon such a motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Fuerst v. Methodist Hospital South*, 566 S.W.2d 847, 848 (Tenn. 1978).

"Adverse possession of real estate is a possession thereof inconsistent with the right of the true owner, and when such possession is accompanied by certain acts and circumstances, the title will vest in the possessor." 10 Thompson on Real Property § 87.01, at 73-74 (David A. Thomas ed., 1994). The essential requirements for adverse possession are "exclusive, actual, adverse, continuous, open and notorious possession for the entire prescriptive period under claim of right thereto." *Hightower v. Pendergrass*, 662 S.W.2d 932, 935 n.2 (Tenn. 1983). The Tennessee Code further describes the requirements for adverse possession under the seven year[1] statute of limitations:

> (a) Any person having had, either personally or through those whom that person's claim arises, individually or through whom a person claims, seven (7) years' adverse possession of any lands, tenements, or hereditaments, granted by this state or the state of North Carolina, holding by conveyance, devise, grant, or other assurance of title, purporting to convey an estate in fee, without any claim by action at law or in equity commenced within that time and effectually prosecuted against such person, *is vested with a good and indefeasible title in fee to the land described in such person's assurance of title*.

[1] Tennessee's common law allows an adverse possession claim after twenty years without color of title. *Wilson v. Price*, 195 S.W.3d 661, 666-67 (Tenn. Ct. App. 2005) (citing *Cooke v. Smith*, 721 S.W.2d 251, 255-56 (Tenn. Ct. App. 1986). Underwood does not claim adverse possession under the common law.

> (b) No title shall be vested by virtue of such adverse possession, unless such conveyance, devise, grant, or other assurance of title shall have been recorded in the register's office for the county or counties in which the land lies during the full term of said seven (7) years' adverse possession.

T.C.A. § 28-2-101 (2006) (emphasis added). Again, the only challenged requirement here is the seven-year "prescriptive period under a claim of right thereto." *Id.*

At the time Underwood filed its complaint, it had not owned Lot No. 1 for seven years because it purchased the lot in 1999 and filed suit in 2005. Thus, Underwood attempts to tack the previous owners' period of ownership to reach the statutorily mandated time period. A party may tack the previous owner's ownership to reach the seven-year requirement. *See Ferguson v. Prince*, 190 S.W. 548, 552 (Tenn. 1916) (describing privity of contract requirement for tacking under seven-year statute); *see also Cumulus Broadcasting, Inc. v. Shim*, 226 S.W.3d 366, 377 (Tenn. 2007). "What is required for tacking is that 'the adverse possessor intended to and actually did turn over possession of . . . [the] land.'" *Cumulus Broadcasting, Inc*., 226 S.W.3d at 377 (citing 10 Thompson on Real Property § 87.14, at 178 and *Derryberry v. Ledford*, 506 S.W.2d 152, 156 (Tenn. Ct. App. 1973)). As the deed from the Wrights to Underwood shows, the Wrights intended to "turn over" Lot No. 1, presumably including the fenced-in portion in question accessible from Underwood's lot. Thus, Underwood can use the Wright's period of ownership if the deed conveys color of title to the strip of land in issue.

The Tennessee Supreme Court defined "color of title" as follows: "'Color of title' is something in writing which at face value, professes to pass title but which does not do it, either for want of title in the person making it or from the defective mode of the conveyance that is used.'" *Id*. at 376 (citing 10 Thompson on Real Property § 87.12, at 145). In *Slatton v. Tennessee Coal, Iron and Rail Company*, the Tennessee Supreme Court stated, "[A] disseizor holds constructive possession of the whole tract only when his entry was under color of title by specific boundaries to the whole tract. The first requisite of such color of title as will give constructive possession to the claimant is, therefore, some definite description showing the extent of the claim . . . ." 75 S.W. 926, 927 (Tenn. 1902). Further, "If no lands are described in [the deed], the possession is limited by the pedis possessio, and it is immaterial whether the deed conveys a good title or not. If no lands are described in it, nothing can pass, the deed is a nullity, and lays no foundation for a claim beyond the actual possession." *Id*. at 927-28.

Cohen v. Woollard is instructive on what is sufficient for a definite description so as to convey color of title. In *Cohen*, the deed described the land as follows:

> [P]art of lot No. 24 in the college plan of lots, fronting thirty feet on Cherry street, and running back towards College street 180 feet, and being the same lot conveyed to me by Levi Moses, by deed of record in the proper office, in book No. 28, page 14.

2 Tenn. Ch. Rpts. (Cooper) 686, 686 (Tenn. Ch. Ct. 1877). The *Cohen* court confronted the following question: "But, says the learned counsel of the Woollards, the land is not sufficiently

described in the assurances of title to give title to the particular land in controversy, and, therefore, there is nothing for the statute to operate upon." *Id*. at 691. "The defect, according to the argument, is not in the actual description—30 by 180 feet in a particular locality—but in the sufficiency of the details to identify the exact 30 by 180 feet in controversy." *Id*. The court determined this description was sufficient to convey color of title as follows:

> [I]f one grant 30 by 180 feet, part of a particular lot, and hath only 30 by 180 feet of that lot, it is enough; especially if he add, being the same conveyed to me by a certain deed, for that is equivalent to saying, "being my land in that lot, which I hold under" the deed. "Levied on John Doak's seventy-acre tract of land on the waters of the west fork of Stone's river" is a good levy. *Parker v. Swan*, 1 Hump. 80. And a sale by John Doak of "my seventy-acre tract of land on the waters of the west fork of Stone's river" would be equally good. . . . If the agreement or deed describe the premises as "my tract of nine acres and sixty-six poles, near, " etc., it is sufficient on its face. *Dobson v. Litton*, 5 Coldw. 619. So, if it say "my 30 by 180 feet, part of," etc., or "the 30 by 180 feet, part," etc., conveyed to me by a certain person; for it is equivalent to saying, the lot now held by me answering to the description. *Simmons v. Spruill*, 3 Jones Eq. 9.

Id. at 692-93.

In the case herein, by virtue of the fact that the land at issue is a lot in a planned development, the description of the land in the deed is minimal. Again, the land was described as follows:

> Land in Davidson County, Tennessee, being Lot No. 1 on the Plan of Antioch Commercial P.U.D. Section One of record in Plat Book 5190, page 734, Register's Office for said County, to which reference is made for a more complete description.

Is this "some definite description showing the extent of the claim"? *Slatton*, 75 S.W. at 927. The Deans argue that the description does not specifically or necessarily include the strip of land in issue. In other words, there is nothing in the deed that Underwood can identify that says, "this deed definitely includes the strip of land in issue." To be sure, the deed has no metes and bounds description of the property conveyed. We conclude that, however, as a matter of law, Underwood's description is of sufficient definiteness to convey color of title to the strip of land in question because it references the plat book that, we must presume, contains a further description that includes the land in issue. In our view, we do this because we should construe the complaint liberally in favor of the plaintiff, taking all of the allegations of fact therein as true. *See Huckeby*, 521 S.W.2d at 571.

Conclusion

Because the deed described the land in question as "Lot No. 1 . . . to which reference [to the Plat Book] is made for a more complete description," Underwood has alleged color of title to the strip of land in question for the purposes of a Rule 12.02 motion to dismiss. We conclude the adverse possession claim was sufficiently pled. Thus, the judgment of the trial court is reversed.

It is further ordered that the costs of this appeal be taxed to the appellant, Billy R. Dean, Peggy L. Dean, and Dean, L.L.P., and surety, for which execution may issue if necessary.

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ROBERT W. WEDEMEYER, JUDGE